IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

F.A. NO. 34 /2006

Division Bench

Single Bench

APPELLANT DEFENDANT : Habeeb Bhai, Aged about 45 years, S/o. Samiulla Siddhique, R/o. Palace Road, Junapara, Baikunthpur, P.S. and Tah.- Baikunthpur, District Surguja (CG)

P.R. No. 495 Lok Corrected Copy
Presented by Shri V.P.
dated 17/12/06

VERSUS

RESPONDENT PLAINTIFF : K.K. Choudhari (Krishna Kumar Choudhari), Aged about 52 years, S/o. Nandram Choudhari, Forest Contractor, R/o. Manendragarh Road, Ambikapur, P.S. and Tahsil Ambikapur, District - Surguja (CG)

FIRST APPEAL UNDER SECTION 96 OF CODE OF CIVIL PROCEDURE

(68)

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HIGH COURT OF CHHATTISGARH AT BILASPUR

FIRST APPEAL No. 34/2006

Habeeb Bhai

Versus

K.K. Choudhari

POST FOR JUDGMENT ON 07/11/2006

Sd/-
Dhirendra Mishra
Judge

(69)

HIGH COURT OF CHHATTISGARH AT BILASPUR

FIRST APPEAL No. 34/2006

Habeeb Bhai

Versus

K.K. Choudhari

Present: Shri Manoj Paranjpe, Adv. for the appellant.

Shri Rajeev Shrivastava, Advocate for respondent.

J U D G M E N T
(Delivered on 07/11/2006)

Per Dhirendra Mishra, J.

This first appeal under Section 96 of the Code of Civil Procedure is directed against the judgment and decree dated 31-1-2006 passed by the District Judge, Sarguja (Ambikapur) in Civil Suit No. 5-B/2003 whereby the suit of the respondent for recovery of the amount has been decreed.

(The parties hereinafter shall be referred to as per their description in the judgment of the trial Court)

2. The plaintiff filed the above suit for recovery of Rs. 1,03,539.40 with the averments that he is a forest contractor and he sold centering plates and timber of Rs. 69,506.40 on credit vide Bill dated 11-5-2000 and 20-6-2000. The defendant promised that he shall be repaying the credited amount by July-August, 2000. However, when the defendant did not pay the amount despite several oral reminders, a registered notice dated 17-6-2002 was sent to him and defendant after receiving the said notice, paid a sum of Rs. 1,500/- on 25-8-2002 and promised to pay the rest amount in the next month. It was further pleaded that he does not keep any separate cash book and whenever any customer buys, an endorsement of credit is entered in the bill itself and whenever the

payment against the credit bill is received, the same is recorded on the back of the credit bill date-wise. Income Tax is assessed on the basis of cash memo. It was further pleaded that the defendant paid Rs. 3,500/- against the Bill No. 6 and claimed interest at the rate of 18%. The suit for recovery with the aforesaid pleadings was filed.

3. The defendant in his written statement denied any purchase of centering plate and sawn timber on credit vide Bill No. 6 and 9. He stated that the above bills do not contain his signature. It was also pleaded that he had purchased timber on 4 occasions and the bill issued bears his signature and the letter dated 25-8-2002 written by the defendant pertains to the amount payable against the above bill. Service of legal notice was denied and it was claimed that the payment against 4 bills mentioned in the written statement has been made.

4. On the basis of the pleadings of the respective parties, learned District Judge framed issues and after recording of statements of the witnesses examined by the respective parties, the suit was decreed with the findings that a sum of Rs. 66,006.40 remains outstanding towards the sold timber against the defendant and the plaintiff is entitled to recover Rs. 37,533.00 by way of interest on the above amount and plaintiff is also entitled for interest at the rate of 18% per annum from the date of filing of the suit and the suit is not time barred and the suit was decreed with costs.

5. Learned counsel for the appellant-defendant submits that (a) the suit of the plaintiff is based on document of Ex. P-2 and P-3 being the credit bills of the sold timber, however the above bills do not bear his signature; (b) the suit has been decreed by mis-interpretation of Section 34 of the Evidence Act and the suit cannot be decreed solely on the basis of entries in the Account Books, even where such books of account are kept in regular

course of business, except where the persons concerned accepts the correctness of the entries; (c) the plaintiff has to prove his own case and the suit cannot be decreed on the basis of weakness of the defendant's case; (d) the plaintiff has neither pleaded nor examined the material witness being the driver of the truck who allegedly obtained the sold timber; (e) the plaintiff has neither pleaded nor filed the Transit permits necessary for transportation of the sold timber as per Kasth Chiran Adhiniyam; (f) the suit has been decreed on improper appreciation of oral and documentary evidence available on record ignoring the pleadings and evidence adduced by the defendant.

6. Reliance is placed on **AIR 1967 SC 1058 (Chandradhan Goswami and others –v- Gauhati Bank Ltd.)** and **1998(II) M.P.W.N. 187 (SC) (Punjab Urban Planning & Development Authority –v- M/s. Shiv Saraswati Iron & Steel Re-rolling Mills)**.

7. On the other hand, learned counsel for the plaintiff submits that the impugned decree passed by the District Judge is not solely based on the document of Ex. P-2 and P-3 but the same is also based on admission of the defendant that he made repayment against the above credit bills. It is further argued that though the Transit Permits were filed by the plaintiff but the same was not taken on record. The attested copies of the above permits are available on the record and the Court can take cognizance of the same as per Section 35 of the Evidence Act. It is further submitted that the statement on oath of the plaintiff regarding repayment of the loan amount is supported by the statement of P.W. 2 Neeraj Verma and the statement of this witness stands unchallenged.

Reliance is placed on **(2005)5 SCC 784 (United India Insurance Co. Ltd. and another –v- Samir Chandra Chaudhary)**, **(1998)3 SCC 410 (Central Bureau of Investigation –v- V.C**

Shukla and others) and **(1998)2SCC 192 (Gulzar Ali –v- State of H.P.).**

8. I have heard the learned counsel for the parties. I have perused the pleadings, oral and documentary evidence adduced by the respective parties.

9. The suit of the plaintiff is based on documents of Ex. P-2 and P-3. The plaintiff claiming Ex. P-2 and P-3 to be Cash memo/Credit memo issued during the course of business has filed the instant suit for recovery of the credit amount along with interest at the rate of 18% per annum. The plaintiff has filed the original bill book for the year 1-4-2000 to 31-3-2001 which contains the carbon copy of the credit bill issued to the defendant. He has also filed bill book for the year 1-4-1999 to 31-3-2000 and composite bill book for the years 1-4-1997 to 31-3-1998 and 1-4-1998 to 31-3-1999. From the perusal of these bill books, it is evident that the above books neither contain printed book number nor they contain printed bill number. There is no certification to the effect that each bill book contains a particular number of bills. The plaintiff has proved the document of Ex. P-2 and P-3. In his evidence through affidavit, he has reiterated the averments of the plaint. It is also stated that he had sent a legal notice Ex. P-4 which was returned with the endorsement that the same could not be served as the defendant was not available in his home. He has also proved the letter dated 25-8-2002 written by the defendant. By this admitted document the defendant has sent a sum of Rs. 1,500/- as a part payment with a promise to pay further amount in the next month. The plaintiff has examined PW-2 Neeraj Verma in support of his case who has stated on oath that the plaintiff requested him to contact the defendant who owes him some amount on credit and to bring whatever amount is given by him. He handed over a letter of the plaintiff to the defendant whereupon

a sum of Rs. 1,000/- was given by him stating that rest of the amount shall be sent later on.

10. Apart from relying upon the documents of Ex.P/2 and P/3 and the credit bills issued to the defendant, the legal notice dated 17.6.2002 (Ex.P/4) and letter of the defendant (Ex.P/6), learned counsel for the plaintiff has pointed out towards the documents of Ex.D/3 filed by the defendant which bears his signature and submitted that carbon copy of the Ex.D/3 admitted by the defendant does not bear the signature of the defendant and thus, the defendant has tried to mislead the Court by putting his signature over the documents of Ex.D/3 after the same was issued by the plaintiff. Further referring the Ex.P/8 it is argued that this is also a credit bill in the name of the defendant which does not bear his signature, however, the defendant has given evasive reply in his cross examination regarding presence of signature of his driver. Further pointing out towards the conduct of the defendant in avoiding receipt of legal notice of Ex.P/4 and also avoiding the service of summons issued by the Court, it is submitted that the defendant has not come up with true facts. The defendant has also not produced the relevant account books maintained by him to prove the purchase made by him from the plaintiff from time to time and the nature of transaction, therefore, the defendant has suppressed the same and adverse inference has already been drawn against him.

11. It is true that from the above conduct of the defendant it is apparent that he has not revealed the truth before the Court and his conduct is not fair. Nevertheless, it is settled position of law that the plaintiff has to prove his case to the satisfaction of the Court and he cannot take advantage from the weakness of the defendant's case to get a decree as is held in the matter of **Punjab Urban Planning & Development Authority** (supra).

12. Now it is to be seen whether the plaintiff has been able to prove his case by leading reliable and cogent evidence. From close scrutiny of pleadings of the plaintiff, documentary and oral evidence adduced by him during trial, the following facts emerges for consideration;

(a) that relying upon the credit bills of Ex.P/2 and Ex.P/3, it has been pleaded by the plaintiff that he does not keep any cash book or ledger except the bill books for running his business. Whenever the timber is purchased on cash a bill is issued to such purchaser and when the transaction is on credit an endorsement of credit is made on the bill itself and whenever payment against the credit bill is received the same is entered date wise on the back of the credit bill and this is the practice adopted by the plaintiff to conduct his business and as per this practice the defendant was supplied timber on credit.

(b) That the assessment for the purpose of sales tax and income tax is done on the basis of bill.

(c) That when the defendant avoided payment against the credit, a legal notice of Ex.P/4 dated 17.6.2002 was sent and the defendant after receipt of the said notice sent a sum of Rs. 1,500/- through Kutub Bhai.

(d) That the payment by the defendant against the bill No. 6 was recorded on the back of Ex.P/2.

(e) That legal notice of Ex.P/4 is composite notice against bill dated 8.1.2000 for Rs. 20,300/-, bill No. 6 dated 11.5.2000 for Rs. 42,445/- and bill No. 9 dated 20.6.2000 for Rs. 27061/-, for a total sum of Rs. 89,806.40 plus interest. In the cross examination the plaintiff has admitted that in the notice of demand of Ex.P/4 amount outstanding against Ex.D/4 was also included, however, he has denied the suggestion that

letter of Ex.P/6 by the defendant is in connection with Ex.D/1 to Ex.D/4. He has also denied that payment against Ex.D/1 to D/4 was not received till 26.6.2002 and the date of payment against Ex.D/4 has wrongly been mentioned.

13. From carbon copy of Ex.D/4 available on record it is observed that against the total credit amount of Rs. 20,300/-, Rs. 12,800/- was already paid up to 05.02.2002 and on the date of legal notice only Rs. 7,800/- was remaining outstanding which are shown to be paid by the defendant on 26.6.2002 through Habib Bhai and accordingly there is an endorsement that total amount against bill No. 13 stands paid. The above entry in the carbon copy of Ex.D/4 stands falsified by the legal notice of Ex.P/4 as well as by the statement of the plaintiff on oath in which the demand for a sum of Rs. 20,300/- has been made against bill No. 13 dated 8.1.2000 and the plaintiff has stated that the defendant himself paid the amount against this bill on 26.6.2002.

14. The plaintiff relying upon the credit memo and entries regarding repayment over back of the same, has argued that the documents of Ex.P/2 and P/3 are in fact the documents of account which is maintained by the plaintiff in his usual course of business and as such the same are admissible. However, from close scrutiny of the bill books it is observed that the practice adopted by the plaintiff during the course of his business was not regular whereas against the bill No. 2 deposits are shown on four occasions and the credit stands repaid but the same has not been added whereas in the case of present transaction vide Ex.P/2 details of payment in three occasions have been added. Similar is the situation with credit bill No. 8 dated 11.6.2000 and credit bill No. 11 dated 22.12.2000 wherein the sum deposited or added only after the credit stands discharged. Thus no uniform practice in

making entry of repayment on the back of the credit memo is adopted.

15. In both the documents of Ex.P/2 and P/3 a signature against column for purchase's signature is present. The plaintiff has not pleaded about the same, however, in his cross examination he has stated that the above signature is of his driver Malkesh Singh who took the consignment from him in his own truck. Malkesh Singh has not been examined as a witness. In paragraph 3 of his cross examination he has admitted that he has licence of saw mill, the bills were issued after the timber were sawn, the forest department issues transit pass after sale on their application and in this case, transit pass has been issued and the same is sent through vehicle and he shall be filing the same after obtaining it from the forest department.

16. The above document has not been exhibited during trial, however, learned counsel for the plaintiff submits that since the documents are the attested copies of the transit passes and the same were issued by a Govt. Department, cognizance of the same can be taken as per Section 35 of the Evidence Act.

17. There is no pleading in the plaint regarding issuance of transit permit by the forest department, however, attested copies of the transit permits dated 11.5.2000 valid up to 13.5.2000 and 20.6.2000 valid up to 22.6.2000, go to show that the plaintiff is the owner of the consignment which was to be transported from Ambikapur to Bhainshajhar, Surajpur, Baikundpur, Katghodi. This pertains to 210 pieces of centering plate and other sawn timber of 145 pieces. In both these documents name of the defendant is not mentioned whereas the bills of Ex.P/2 and P/3 are issued in the name of defendant resident of Junapara, Baikuntpur.

18. On the other hand, defendant has filed consumer sales certificate for the purpose of transporting timber within district of

Sarguja issued by the plaintiff. From the above document it is evident that the plaintiff was required to issue consumers sales certificate at the time of sell of consignment through Ex.P/2 and P/3 also. However, the plaintiff has not cared to plead or prove any such document by filing the same to establish the credit transaction.

19. Section 34 of the Evidence Act is being reproduced hereunder;

> 34. **Entries in books of accounts when relevant**.-Entries in books of account, [*including those maintained in an electronic form*], regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statement shall not alone be sufficient evidence to charge any person with liability.

It is settled law that the principle of this Section is to admit only such statements recorded by a party in his own behalf as by their nature and circumstances are ordinarily beyond his power to tamper with, undiscovered for the purpose of a particular case. Therefore, when an entry of that kind is tendered, it must be shown- (a) to be in a book, (b) that book must be a book of account, and (c) that account must be one regularly kept in the course of business. These essentials require to be carefully observed.

The term "Books" in this Section may properly be taken to signify, ordinarily, (i) collections of sheets of paper bound together, (ii) with the intention that such binding shall be permanent and the papers used collectively in one volume.

20. In the matter of **Central Bureau of Investigation** (supra), the Supreme Court while considering the meaning of book of account under Section 34 of the Evidence Act in paragraph 26 has held as under;

> "26. In *Mukundram* after dealing with the word "book" (to which we have earlier referred) the Court proceeded to consider what is meant by a "book of account" under Section 34 and stated as under:
>
> "To account is to reckon, and I am unable to conceive any accounting which does not involve either addition or subtraction or both of these operations of arithmetic. A *book which contains successive entries of items may be a good memorandum book; but until those entries are totalled or balanced, or both, as the case may be, there is no reckoning and no account.* In the making of totals and striking of balances from time to time lies the chief safeguard under which books of account have been distinguished from other private records as capable of containing substantive evidence on which reliance may be placed."

21. If the above definition is adopted in the present set of facts, I have no hesitation in reaching to the conclusion that the documents of Ex.P/2 and P/3 together with the endorsement on the back of these documents cannot be considered to be a book of account as there is no totaling or balancing or both and as such there is no reckoning and no account. In order to make the document in question admissible, the same have to be regularly kept during the course of business.

22. As has already been pointed out in the earlier paragraphs that there is no regularity in making entries of the amount

deposited towards the credit of the plaintiff and as such the document does not satisfy the requirement of "regularly kept" so as to satisfy the last requirement under Section 34 to be admissible in evidence as a relevant fact.

23. It is settled law that entries in the books of account are not by themselves sufficient to charge any person with liability, the reason being that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of the parties. There must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. In the instant case the dispute between the plaintiff and the defendant is regarding transaction vide documents of Ex.P/2 and P/3 which do not bear the signature of the defendant. The Court below has based its judgment on the above documents considering the same to be a books of account regularly kept during the course of the business and further considering the letter dated 25.8.2000 as an admission on the part of the defendant of his liability, has decreed the suit. Thus, plausible defence of the defendant that the above letter refers to the transaction vide Ex.D/1 to D/4 and payment was against those documents, has been disbelieved.

24. I have already pointed out in the foregoing paragraphs that the genuineness of the entries made by the plaintiff in the carbon copy of Ex.D/4 is doubtful and in view of the fact that a composite legal notice of demand of Ex.P/4 was in relation to bill No. 13 dated 8.1.2000 also, the probability of the defendant's paying the admitted sum on 25.8.2000 cannot be ruled out. The plaintiff was required to prove his case by the best evidence which was in his possession such as by examining the driver of the truck who has signed the above documents as purchaser and as per case of the plaintiff the consignment was delivered to the defendant through

his own truck by the said driver. In view of the fact that the defendant has categorically denied any transaction vide Ex.P/2 and P/3 and also in view of the fact that the consumer sales certificate is issued by the retailer who effects sale (plaintiff in the present case) which has not been disputed by the plaintiff in his cross examination, the non-filing of copy of such certificate by the plaintiff which must be in his possession, makes the case of the plaintiff doubtful.

25. So far as the law laid down by the Apex Court in the matter of **Gulzar Ali Vs. State of H.P.** (supra) is concerned, referring to paragraph 9 of the above judgment learned counsel for the respondent has argued that handwriting of the driver Malkesh Singh can be established by two other modes also and therefore, non-examination of Malkesh Singh was not fatal. In the instant case, the signature of Malkesh Singh has not been disputed, the only thing for consideration was the fact that the Malkesh Singh received the consignment from the plaintiff to deliver the same through truck of the plaintiff to the defendant and accordingly, the same was delivered to the defendant can be established only by examining Malkesh Singh.

26. In the matter of **United India Insurance Company** (supra) the Supreme Court considering the admission of the respondent in his application for claim as also the admission of brother of the respondent that the vehicle in question was damaged as a branch of eucalyptus tree fell on the vehicle, has held that the forums below were not justified to allow the damages to the respondents ignoring their admission. In the instant case the admission is only to the effect that the payment was made vide document dated 25.8.2002, however, the same pertained to another transaction and therefore, the same cannot be considered as admission of the defendant of his liability arising out of credit bills of Ex.P/2 and P/3.

27. On the basis of aforesaid discussions, this Court is of the considered view that the plaintiff has failed to prove its case by leading cogent and reliable evidence and the finding of learned District Judge decreeing the suit of the plaintiff, is erroneous and is liable to be set aside. Accordingly, the appeal is allowed. Judgment and decree passed in favour of the respondent/plaintiff is set aside, consequently the suit preferred by the respondent/plaintiff is dismissed. However, taking into consideration the facts and circumstances of the case it is directed that parties shall bear their own costs.

Sd/-
Dhirendra Mishra
Judge

P/Khan